19- 1630

in the

UNITED STATES COURT OF APPEALS

For the First Circuit

Jeffrey G. Carswell; Heinz Eriksen; Bent Hansen

Petitioners

v.

E.Pihl & Son; Topsoe- Jensen & Schroeder Ltd; Danish Construction Corporation; Director OWCP, US Department of Labor

Respondents

On Review from the Benefits Review Board of the US Labor Department

BRIEF AND ADDENDUM OF PETITIONERS

Ian Anderson Esq.
Attorney for Petitioners
P.O.Box 150362
Kew Gardens, New York 11415
718- 846- 9080

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE REFERENCES

STATUTES

REGULATIONS & RULES

TABLE OF ABBREVIATIONS

"DO ", denotes reference to ALJ Decision and Order.

"T- ", denotes transcript testimony evidence.

"Ex C- ", denotes documentary evidence of Carswell

"Ex E- ", denotes documentary evidence of Eriksen.

"Ex H- ", denotes documentary evidence of Hansen.

"Ex G- ", denotes general documents relevant to all Petitioners' cases.

"Ex D- ", denotes documentary evidence of Employer.

"Ex DOL- ", denotes documentary evidence of IME Siegel.

DANISH PETITIONERS REVIEW BRIEF

JURISDICTIONAL STATEMENT

1) This Agency Review is pursuant to 33 USC 921 (c) of the Longshore and Harbor Workers Compensation Act, (LHWCA), as extended by the Defense Base Act, (DBA). It falls into a jurisdictional "wasteland". Nobody knows for certain which court has review jurisdiction. This Court in *Truczinskas v.Director OWCP* 699 F.3rd. 672,675, believes it has jurisdiction. But five (5) other Circuit courts, believe only the District courts have jurisdiction. [1]

2) On 10/18/17 the ALJ disposed of all Petitioners' claims in a 164 page judgement. A timely review to the Benefits Review Board, (BRB) to vacate, was filed on 11/14/17 and denied on 12/11/18. Over Petitioners' objections, their timely1/14/19 Petition for Federal review, was transferred by the Second Circuit to this Court.

3) On 10/18/19 this Court denied Petitioners' application for 28 USC 1254 (2) certification to resolve the jurisdictional quagmire.

4) A summary of the 164 page ALJ findings, together with the list of witness is contained in the Addendum.

---

[1]Namely, the Fourth, Fifth, Six, Eleventh and DC Circuits respectively in; *Lee v. Boeing Co.* 123 F.3rd. 801,805; *AFIA/CIGNA Worldwide v. Felkner* 930 F. 2nd. 1111,1116; *Home Indemnity Co. v. Stillwell* 597 F.2nd. 87, 88-89; *ITT Base Serv. v. Hickson* 155 F. 3rd. 1272, 1275; and *Hice v. Director OWCP* 156 F. 3RD. 214 at 217.

OVERVIEW

5) There was a consensus among the parties that Petitioners' work related cancers could only be reliably determined by objective testing their urine for plutonium, (Pu 239). But their wage- loss claims were denied on a melange of hypothetical evidence, after the Director's "independent' medical examiner refused to conduct such testing and the employer declined to do so.

STATEMENT OF ISSUES FOR REVIEW

a) Whether the Director's actions as "party- litigant" in opposing Petitioners' wage loss claims with the employer, conflicted with his support role as claims administrator and nullified the LHWCA's scheme for fair and efficient resolution?

b) Whether the ALJ misapprehended the required standard of "awareness" in LHWCA sec. 913 b) 2), by finding Carswell and Eriksen's claims untimely?

c) Whether probability evidence was insufficient to rebut work- related causation when the parties agreed that testing Petitioners' urine for Pu 239 excretion would reliably determine this issue?

STATEMENT OF PETITIONERS' WAGE LOSS CASES

6) Danish Petitioners' developed non- familial cancers from inhalation and ingestion of Pu 239, (weapons grade plutonium), during emergency work in the Arctic, to protect local Inuit people and personnel at a US Air Force Base where Petitioners were employed.

7) Pu 239 emits ionizing radiation, but unlike other ionizing radiations cannot

penetrate healthy skin. It is deadly however if it enters the body by inhalation and to a lesser degree by ingestion. DO 86 Once inside the body it can remain for decades, continually irradiating surrounding cells and tissues until finally excreted in the urine and feces. T- 2015; T- 2022. It also has a toxic heavy metal component. Ex G-3 page 1.

Pu 239 can only be safely handled in laboratories through sleeve gloves in sealed fume- cupboards at negative pressure. T- 996, T 997 Out- side of controlled laboratory safety environments, it is virtually undetectable. Ex G-3, pages 1,2.

8) The emergency work resulted from the crash of a US B-52 aircraft and the burning of its nuclear bombs, which released trillions of respirable particles of Pu 239, contaminating snow and sea ice over a wide area. DO 86, 141.

9) Resuspension of Pu 239 particles by wind or soil disturbance, DO 142, creates a continual threat of inhalation and ingestion from nasal secretions. Petitioners took part in hazardous emergency work to remove and load Pu 239 contaminated ice and snow into make- shift containers for shipping to the US.

10) The employer kept no records of their radiation exposure nor issued necessary sealed face masks to protect against Pu 239 inhalation and ingestion. Nor were they given radiation detection devices.

11) They were told there was no danger. T- 452, T- 453. Since Pu 239 cannot be detected by the human senses, they were unaware of the presence of harm. Nor had they any experience of radiation work.

12) In 1986 Carswell developed stomach cancer and related esophageal problems; and a thyroid problem in 2005. In 2002 and 2005 Hansen and Eriksen respectively developed left kidney cancers.

13) Petitioners were employed by a US Air Force contractor, not a US Energy Department contractor. This barred them from filing radiation work- claims under the Energy Employees Occupational Injuries Compensation Act, (EEOICA), providing state- of- the- art testing procedures, including urine testing and an expert panel to accurately assess work- related radiation illnesses.

14) The Director administers both the EEOICA and the LHWCA, but the different results in radiation cases under the two acts is startling. See *Kaneshiro v. Holmes & Narver et al*, BRB Nos. 06-0804; 07-0251. (7/25/2007).

15) Kaneshiro's DBA/ LHWCA claim for leukemia from his catering work at a US nuclear test site was denied on adversarial testimony of his employer's expert.

16) His employer was a DOE contractor, so he refiled under the EEOICA when it came into force. By applying expert testing procedures, his work related leukemia claim was upheld. The Director withdrew the prior contrary finding under LHWCA's adversarial procedures.

17) Petitioners filed DBA wage- loss claims after obtaining a November 2008 scientific report on the release of trillions of deadly respirable particles of Pu 239; and medical opinions in October 2008 linking their cancers with Pu 239. Their wage loss claims were filed in June, July 2010.

18) The ALJ conducted four years of hearings in New York, from December 4th. 2012, denying their claims in a 164 page decision and order of October 18th. 2017.

19) During the hearings the Director consistently tried to defeat the claims, by;

i) Appearing from the start of the hearings as a "party litigant" in opposition with the employer; filing dismissal motions, evidence in opposition, delaying proceedings, cross- examining and filing post- hearing dismissal arguments with the ALJ and BRB. (DO 160, 161).

ii) Failed to arrange any independent medical examinations, (IMEs), while Petitioners were in New York, despite four (4) months notice. [2] To avoid sec.919 (h) LHWCA dismissal, the ALJ ordered him to pay Danish Petitioners' additional unaffordable costs of returning for their IMEs.

iii) Threatened employer's Danish bankruptcy trustees with a $200 million claim unless its Park Avenue attorneys were re-authorized to continue opposing the wage- loss claims, (The $200 million threat only came to light after being widely reported in the Danish press)

iv) Utilized tax payer money to translate a Danish report relied on by the employer, after it refused to translate it.

v) Obtained and paid for an "independent "medical examiner with no training or experience in radiation medicine, who, contrary to the consensus of the parties, refused to conduct objective urine testing for Pu 239 excretion. DO 156. 157.

---

[2] On 8/6/12 the ALJ ordered hearings for 12/4/12.

SUMMARY OF THE ARGUMENT

i) Nullity and Invalidity of Proceedings. Director's Intent to Defeat Cases Incompatible with His LHWCA Administrative Support Role.

20) Director's LHWCA support role as claims administrator. No party litigant standing in ALJ or BRB proceedings, "*Harcum*" case. Secretary's "*interested party*"regulation invalid to create "party litigant" rights; *Harcum*; regulation *ultra vires* of parent act; contrary to Federal law on "*interested party*" rights. Director no warrant of law to defeat of Petitioners' claims. Incompatible with support role. LHWCA scheme of fair and efficient resolution nullified. Actions contrary to 18 USC 1346 honest service rights.

ii) Timeliness of Carswell and Hansen's Wage Loss Claims for Latent Occupational Diseases

21) Failure of employer to keep radiation records or issue detection devices. No Pu 239 safeguards or employee awareness of dangerous work inhalation. ALJ error. "Awareness", for two years filing period, requires specialized advice in non-traumatic latent illness cases. Due diligence blocked by governmental secrecy. Barnaby and Robbins' scientific and medical reports on inhalation hazards only obtained in 2008.

iii) Emergency Work Inhalation/ Ingestion of Pu 239 ; Cancer Causation; Objective Evidence v. Probability

22) Inadequacy of LHWCA procedures; *Kaneshiro* case; Consensus on urine testing; IME's refusal to conduct such tests; probability default evidence not

discharge burden of production; occupational studies excluded by ALJ's error on Pu 239 and ionizing radiation; ALJ accepts statistical report of one employer's expert as "persuasive" but is based on discounted report of its other expert.

ARGUMENT ON REVIEW

Standard of Review

23) The Court's review standard is identical to the BRB; *Presley v. Tinsley Maint. Serv.*, 529 F.2d 433 (5th. Cir. 1976), namely whether the ALJ correctly applied the law and whether her findings are supported by substantial evidence; *Burns v. Director, OWCP*, 41 F.3d 1555, (D.C. Cir. 1994); *Whitmore v. AFIA Worldwide Ins.*, 837 F.2d 513. (D.C. Cir. 1988)

Nullity and Invalidity of Proceedings. Director's Intent to Defeat Cases Incompatible with His LHWCA Administrative Support Role

24) The Director only exercises support functions for the Secretary under LHWCA, including assisting claimants with their claims, *per* 33 USC 939 (c)(1).

a) Director No Party- Litigant Standing in Law to Oppose LHWCA Cases

25) The Supreme Court in *Director OWCP v. Newport News Shipbuilding and Dry Dock Co.* 514 US 122, (the 1995 "*Harcum*" case), found no Congressional intent in LHWCA to confer party- litigant standing on the Secretary, (hence the Director), in ALJ or BRB proceedings. If there was, the Director, as a party- litigant, could review BRB decision he disagreed with. But the Director has no such right of

standing or Federal review.[3]

26) In *Harcum*, the Director tried to review a BRB decision, asserting party-litigant status under the LHWCA. After searching the LHWCA for party litigant standing, the Supreme Court unanimously held, *per* Scalia J., that;

"*With regard to claims that proceed to ALJ hearings, the Act does not by its terms make the Director a party to the proceedings, or grant her authority to prosecute appeals to the Board, or thence to the federal court of appeals.*"

(Scalia J. *ibid* 126)

27) Director had no party litigant standing under the LHWCA, "*solely upon the mere existence and impairment of her governmental interest*"; *ibid* 130; as the Director in Petitioners' cases also belatedly claimed for Special Fund protection.

28) Congress conferred standing on the Secretary under the Black Lung Benefits Act ("BLBA"), as a party to "*any proceedings relative to a claim for benefits*", (30 USC 932 (k)), but not so under the LHWCA. (*ibid* 129,130)

29) ALJ and BRB proceedings were part of the LHWCA scheme for the "*fair*" resolution of private disputes between employees and their employers, not disputes with the Director, (*ibid* 131), who has only an administrative support role. (*ibid* 130, 131).

---

[3] When an employee or employer challenges a BRB decision by Federal review, the BRB may nominate the Director to represent it, only under FRAP Rule 15, not the LHWCA; *Ingalls Shipbuilding Inc. v Director OWCP* 519 US 248, 264.

b) ALJ's Error in Law

30) ALJ erred in law by finding it "*prudent*", (DO 161),for the Director to appear as party litigant and oppose Petitioners' cases to "protect"possible Special Fund payments, but, i) the Director appeared as a party litigant, eight, (8), months before the employer's August 2013 bankruptcy; ii) there was no evidence the Danish trustees had insufficient funds. Petitioners filed illiquid claims in bankruptcy, notifying them to allocate sufficient funding.

31) BRB also erred in law in affirming Director party- litigant standing before the ALJ and before the BRB itself, by relying on pre- 1995 *Harcum* decisions, its own BRB case law [4] and the Secretary's "*interested party*" Regulation.

(Addendum; BRB Decision, Fn.7, pages 4,5)

c) Secretary's 20 CFR Part VI, Sub- chapter A, (LHWC) 702.333 (b) Regulation

32) This authorizes the Solicitor of Labor, or designee, to represent the Director in LHWCA hearings as an "*interested party*". But due to "*Harcum*", 126, it cannot be construed to confer party- litigant rights. If so, the Director could review BRB decisions. It would also be *ultra vires* of the LHWCA.

See *J.W. Hampton Jr. & Co.v. United States* 276 US 394 at 407 where the Supreme Court distinguished between the "*power to make law*", ie Congress, and

---

[4] In review proceedings the Board's interpretation of the LHWCA is not entitled to deference from the courts. See US Supreme Court ruling in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18.

delegated administrative authority to execute law, which is only to be " *exercised under and in pursuance of the law*".

d) "*Interested Party*" No Party- Litigant Rights Under Federal Law

33) An "*interested party*" has no party- litigant rights under Federal case law. In *Green et al v. Bogue* 158 US 478 at 503 the Supreme Court held a non- movant party, with only a financial interest in the out - come of a case, has no standing or rights as a party-litigant to "*make defense, to adduce and cross- examine witnesses, and to appeal from the decision, if an appeal lies*." Nor is such an " *interested party*" considered in determining issues of *res judicata*.

34) Also followed in state courts. *Knickerbocker Trust Co. v. T.W.P. & M. Railway Co.* 139 App. Div. 305 (NY), at 308. Non- movant Village of Mamaroneck, with only a financial interest, had no party- litigant rights.

34) The Director is not a claimant under the DBA or LHWCA and has total discretionary control over his "*interest*" in the Special Fund.

e) Nullification of LHWCA Proceedings and Decision

35) Congress did not intend a worker to have to fight the government and the employer for no- fault, wage losses under LHWCA, Congress' intended humanitarian relief for injured workers under LHWCA, with a presumption of compensability. *O'Keeffe v.Smith, Hinchman & Grylls Assoc.* 380 US 359, 362.

36)The Director is a claims administrator for processing and facilitating LHWCA claims and their resolution in a timely and fair manner *per* 33 USC 939 (c)(1). See,

Maine v. *Brady- Hamilton Stevedore Co.*, 18 BRBS 129 and 20 C.F.R. §§702.301 to 702.321; *Harcum*, *supra* at 131.

37)Vigorously opposing Petitioners' claims by egregious actions as party litigant, (paras. 19(i)- (v) above), conflicted with his administrative LHWCA role of providing impartial medical examinations and formally issuing final orders.

38) It was reversible error, to allow him to oppose as a party litigant. ALJ hearings and decision a nullity, not being in conformity with LHWCA's provisions.

Timeliness of Carswell and Hansen's Compensation Notices For Latent Occupational Diseases.

39) In finding the employer rebutted the timeliness presumption of sec. 920 b), the ALJ misapplied the sec. 913 b) (2) legal standard for timeliness of latent occupational disease claims.

40) Carswell's LS 203 compensation notice was filed on July 26th. 2010. Hansen's on August 13th. 2010, within two years of obtaining professional opinions from Robbins' October 2008 medical affidavits and Barnaby's November 2008 nuclear physics report on the release of 4 trillion respirable particles of Pu 239 at Thule.

.41) Under LHWCA Sec. 913 b) (2), compensation claims for a latent work diseases are timely filed;

"within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability".

42) Sec. 913 b) (2)'s references to being, or becoming "*aware*" are subject to the same standard of "*awareness*". The inclusion of "*medical advice*" for "*awareness*" requires specialized advice or information, not speculation or supposition. See also Congressional intent in section 908(c)(13)(D) LHWCA where the notice period only starts after a claimant receives an audiogram and a written report in hearing- loss claims.

43) Unlike palpable traumatic injuries causing disease, Petitioners had no physical "awareness" of exposure to, or harmful inhalation of Pu 239.

a) ALJ's Legal Error on Knowledge of Other Workers Illnesses

44) Because Carswell, (living in Australia in 1980s), discovered many former workers in Denmark, had similar conditions, (DO 133), and Hansen, in 2003, "*suspected a link between his cancer and his occupational exposure*" , (DO 134), the ALJ time- barred their 2010 claims.

45) But knowledge of other workers health problems or even compensation claims, is insufficient to rebut sec. 920 b) timeliness presumption; See *Bath Iron Works v. US Dept. of Labor* 336 F 3rd. 51 at 58.

46) The ALJ's approach was also contradictory. She rejected evidence of Dr. Kofoed- Hansen's "*suspicion*" his urinary tract cancer resulted from scientific work at Thule, because the lead scientist of the Danish team sent to Thule contracted and died of the same cancer. Kofoed- Hansen's Diary, Ex- G 18.

This was *"at best anecdotal evidence. Coincidence and causation are not the same thing."* DO 157.

b) ALJ Confused Sec. 913 b)(2) Reasonable Diligence with "*Awareness*".

47) Since their latent diseases did not arise from palpable or traumatic work injuries, Carswell and Hansen conducted sec. 913 b) (2) "*reasonable diligence*" to see if their cancers resulted from their emergency work.

i) Carswell's Diligence

48) Initially Carswell consulted his Australian treating physician, Graeme Edwards. He was unable to give a definitive opinion without information on the nature or degree of exposure, if any.

He could only say that "*if*" there had been such exposure, it would be a "*significant factor in the aetiology of his carcinoma*". Ex C- 3. The missing factor was knowledge of the "*precipitating event*", namely the inhalation and ingestion of Pu 239, only later supplied in the 2008 reports of Drs. Barnaby and Robbins. [5]

ii) Governmental Obstruction

49) In 2002 Carswell tried to obtain specific information on radiation at Thule by petitioning the EU Parliament to require Denmark to release its radiation data on the B- 52 crash and burning of nuclear bombs. The petition also wanted Denmark

[5] After Barnaby and Robbins' 2008 reports were available, Dr. Edwards was able to affirmatively state in a 2009 memorandum, that Carswell's hypothyroidism, diagnosed in 2005, was with "*a reasonable degree of probability*", attributed to the long term effects of radiation. Ex C- 5.

to comply with EU law, Directive 96/29, for continual monitoring of workers potentially exposed to past radiation. The Petition, (Ex D- 2) was to;

> *"make available to former Thule workers and the public the 1968 scientific records of radiation contamination at Thule. Greenland".*

50) The availability of such records would help physicians to properly diagnose and treat both his own conditions and those of other former workers. (Carswell T- 801, T- 809)

51) In an historical vote, 97% of the EU Parliament's over 650 members, approved both Petition requests and directed Denmark to comply. In an equally unprecedented response, Denmark refused on both counts.

52) Denmark continued to suppress all public access to quantitative information on Pu 239 contamination, which it initially banned after the B- 52 crash. See, G-5 letter of US agreement with Denmark to suppress public access.

iii) Hansen's Diligence

53) Hansen stated after his left kidney removal, he had no evidence linking it to his emergency work at Thule (T- 2339) Three years later in 2005, he became "*interested*" to see if a "*pathology result*" of his check- up, (Medical Records, H- 3 page 10), showed any link between his cancer and the emergency work. (T- 2291, T- 2292)

54) He did not fully understand what the emergency operation at Thule related to,

(T- 2333), nor the actual nature of contamination. (T- 2305) Being a carpenter by trade, he was unable to find any link.

iv) Record as a Whole Not Rebut Timeliness

55) By misapplying the legal standard of awareness in sec 913 b) (2) and confusing due diligence with knowledge, the ALJ misdirected herself by finding the record as a whole rebutted the sec 920 b) presumption of timeliness.

56) Without access before 2008 to actual scientific and specialized medical information, Carswell and Hansen had no sec 913 b) (2) "awareness" of the non-palpable work- cause of their latent illnesses.

57) Though the ALJ held that Dr. Robbins had "*expertise in occupational health*" (DO 143) she made no reference to his October 20th. 2008 medical affidavit in considering the evidence as a whole, though sec 913 (b)(2) awareness arises "*by reason of medical advice.*"

58) In such circumstances no reasonable mind could accept mere suspicion or supposition as adequate to rebut timeliness. See *Bath Iron Works supra* at 58.

Emergency Work Inhalation/ Ingestion of Pu 239 and Cancer Causation

a) Consensus on Urine Testing to Determine Causation;

59) The ALJ found that amongst the parties there was a; "*scientific consensus that urine testing will reflect exposure to plutonium radiation*". (DO 156, 157)

60) Anspaugh, (employer's dose reconstruction expert), testified that data from the person in question, was the most reliable method of assessing causation and

radiation dosages to particular organs.

"*as you go progressively down the line of reliability, the top of the hierarchy is some kind of sample from the person himself. And the bottom is some kind of broad- based hand- waving or speculation.*" T-1160, T-1161.

61) He testified that if inhaled, Eriksen and Hanson's kidneys would have been irradiated over the years by slow Pu 239 excretion in their urine.

"*The main way it* [Pu 239], *is going to get into the kidney is by passing through ...you know, the plutonium is excreted in the urine and feces, and so as the plutonium goes through the kidney, its going to give some dose to the kidney.*" T- 1204

62) Similarly with Carswell, (who regularly drank beverages for three years after the emergency, with ice from the crash fjord, T-1706, T- 1707), Anspaugh testified that while most of Pu 239 entering the stomach would be excreted, small amounts would pass through the gut- wall, irradiating tissues. T-1204. [6]

63) In Anspaugh's opinion, urine testing for Pu 239 was the most reliable method to determine an occupational link with Petitioners' cancers. Anspaugh T- 1404.

b) Keeping Objective Urine- Testing Evidence Off the Record

64) Despite the parties' "*consensus*" on urine testing, Siegel, (the Director's paid-for IME), refused to conduct it, though also agreeing that urine- testing would determine the issue of causation. Ex DOL- 2 at 19, DOL- 3 at 18, DOL- 10 at 30.

65) The ALJ believed she could not order Siegel to conduct such tests and had

---

[6] His testimony of further harm to the stomach from Pu 239 nasal secretions is missing from the record but recalled by Turnbull, (T- 1713) who sat through his evidence. See para. 92.

denied an earlier motion in the case by Petitioners for such IME testing.[7]

66) The employer declined to exercise its right to conduct objective urine testing for Pu 239, relying in instead on a melange of statistical probabilities and hypothetical medical evidence without any examinations.

67) It was reversible error to find that such evidence rebutted causation. No reasonable mind would accept that the employer's statistical probability evidence was substantial to rebut causation, when it agreed that urine testing was the only reliable method of determining the issue. (Anspaugh T- 1404; Siegel, *supra*, para 64; DO 157) See "*reasonable mind*" test in Conoco Inc. v. Director OWCP 194 F 3rd. 684, 690, citing Noble Drilling v. Drake 795 F.2nd. 478,481.

c) ALJ Reliance on Mettler's Statistical Evidence Excluding Excess Risk of Kidney and Stomach Cancers

68) Instead, the ALJ materially misdirected herself by; i) relying on Mettler's "*hand- waving*" statistical evidence of a lack of excess risk of kidney or stomach cancer, (DO 154), which, ii) was "*bolstered*" by speculative testimony of two surgeons, Russo and Turnbull, (*ibid*), without knowledge or experience of radiation, who conducted no examinations, and iii) the further probability evidence of Juel, (DO 157) a Danish Government epidemiologist, also without knowledge or expertise in radiation.

---

[7] 6/10/13 order, citing Bordeaux v Pittsburg & Conneaut Dock BRB No. 04-0483

i) Mettler's Model for Excess Cancer Risk Assessment
Inconsistent with Long- Term Internal Irradiation Cases

69) Mettler's statistical cancer risk assessment inappropriately used a Japanese atomic bomb model of single instance exposure to massive, X- Ray like, skin penetrating radiation. Contrary to Petitioners' decades long persistent internal tissue irradiation from inhalation/ ingestion of non- skin penetrating Pu 239.

70) Mettler acknowledged that due to the height of the Japanese atomic detonations, little if any irradiation danger existed from inhalation or ingestion of wind - bourne particles. Such respirable particles were swept up into the stratosphere. Mettler T- 1545, T- 1546. As such, the atomic bomb model did not address cancer risks from continual decades long internal tissue irradiation from inhalation or ingestion.

ii) Statistical Problem with Low- Dose Levels and
Excess Cancer Assessment

71) Mettler admitted that exposure of thousands of people to high dose levels of radiation was necessary to statistically assess excess cancer risks, because below a certain dose- level, such risks are statistically difficult to ascertain . Mettler T- 1465, "*things that are low dose, you tend not to get effects*." Below that level there may or may not be a risk. T- 1487. (Contrary to definitive urine testing results for Pu 239 excretion.)

Employer's expert Anspaugh also testified that it can never be said that Claimants were never exposed to radiation or that their cancers were never caused by

radiation. T- 2051.

iii) Mettler's Evidence Contrary to Reports on Plutonium and Kidney & Stomach Cancers

72) Mettler stated that ionizing radiation from plutonium exposure had never been statistically shown to cause such kidney, stomach or thyroid cancers. (T- 1518- T-1520 ; DO 154), though that possibility could not be excluded. T- 1536, T 1537.

A) Occupational Kidney Cancer

73) But the Boston Center for Environmental Health Studies' extensive research on "*Cancer and Workers Exposed to Ionizing Radiation*", contains several occupational reports on the excess kidney cancer risk among plutonium workers. (Ex G- 21 at page 47),

74)For example; "*Cancer Mortality and Morbidity Among Plutonium Workers at The Sellafield Plant of British Nuclear Fuels*", (British Journal of Cancer 1999: 79(7/8) 1288-1301); "*Mortality Though 1990 Among White Male Workers at the Los Alamos National Laboratory; Considering Exposure to Plutonium and External Ionizing Radiation.*" (Heath Physics 1994;67 (6):557- 586)

75) These reports corroborated Robbins' "*medical degree of probability*", that Eriksen and Hansen's unprotected exposure to Pu 239 inhalation caused their kidney cancers. (Ex E- 5, Ex H- 5)

B) Occupational Stomach Cancer

76) The Boston report also noted that the US National Research Council found the

stomach was sensitive to ionizing radiation,(Ex G- 27 page 91), and listed several reports on excess stomach cancers in exposed radiation workers. (*ibid* 91 to 92) including a DOE work report on Portsmouth nuclear bomb workers, (*ibid* 92), Alvarez R. "*Risks of Making Nuclear Weapons*".

77) In Carswell's case, while most of the Pu 239 he ingested from contaminated ice cubes would be excreted, small amounts would pass through his gut- wall, consistently irradiating tissues over a three year period of regular ingestion. See, Anspaugh T-1204. [8]

C) Thyroid Conditions

78) The Boston report found strong evidence in work studies linking thyroid cancer with ionizing radiation. (*ibid* 99 to 100), both internally and externally, (*ibid* 101, National Research Council.)

79) Contrary to Mettler's hypothesis, (DO 154), atomic bomb survivors also had excess rates of autoimmune thyroid disease, (*ibid* 101, reference 84) citing Nagataki *et al; "Thyroid Diseases Among Atomic Bomb Survivors in Nagasaki"*, Journal of American Medical Association 1994; 272 (5) 364- 370.

Carswell's deteriorating hypothyroidism is associated with Hashimoto's thyroiditis, also an autoimmune thyroid condition. Ex C-4.15

---

[8] His recreational ingestion falls within the Zone of Special doctrine for remote work sites. *O' Keeffee v. Pan Am World Airlines* 338 F 2nd. 310 (5th. Cir), fn 3,citing the seafarer analogy in *Aguilar v. Standard Oil Co.* 318 US 724, 743.

D) The ALJ Dismissed Work- Studies
by Misunderstanding Ionizing Radiation

80) The ALJ erroneously dismissed all occupational reports in the Boston research (Ex. G.-21), linking kidney and stomach cancers to ionizing radiation. She believed the medical effect of plutonium's ionizing radiation was some how different from what she called "*general*" ionizing radiation. (DO 153)

81) But US Nuclear Regulatory Commission defines "*ionizing radiation*" in 10 CFR Part 20 Sub Part A Sec 1003 to include all ;

" alpha particles, beta particles, X Rays, neutrons, high speed electrons, high speed protons, and other particles capable of producing ions.".

Anspaugh testified that plutonium's ionizing radiation was produced by *alpha particles*. (DO 90) The only "difference" in medical effect related to duration and intensity of the ionizing radiation, not the particle source. As such, the occupational studies, including plutonium studies, were wrongly dismissed.

E) ALJ 's Conflicted Finding on Organ Dose Estimates Based from Unreliable Old 1988 Urine Study; (Scientific House of Cards)

i) Anspaugh's Organ Dose Estimates

82) Anspaugh was originally instructed by the employer to estimate organ dosages of 54 unidentified former Thule workers, (not Petitioners), from single- day urine excretion- data in an old untranslated, 1988 Danish study. Ex. D- 29. His organ dose calculations, (Ex. D 23) were in turn relied on by Mettler in his report, (Ex. D-32 pages 6, 7), and his testimony that such dosages were too low to cause cancer.

T- 1489, T- 1542.

83) The employer admitted Mettler relied on Anspaugh's low dose estimations from the old study. T- 1151 to T-1153.

84) When the 1988 urine study was translated however, (after Anspaugh's first day of testimony; DO 151), it was discovered that the compilers had allocated a fictitious amount of Pu 239 excretion to each worker, since the 1988 out- of- date methodology, not used today, (T- 2032), was unable to detect Pu 239. Ex. D- 29 page 25. These fictitious "findings" were the basis of a scientific house- of- cards, on which both Anspaugh's organ dose assessment and Mettler's low cancer risk report and testimony were built.

85) The translated study also revealed the compilers reservations about its reliability, including their inability to calculate an average Pu 239 daily excretion rate, (varying from up to 70%), from a single- day urine sample. This, they admitted was "*another disturbing fact*" about their report. Ex. D- 29 pages 21, 22. Normally "short term" Pu 239 urine excretion studies require several months of data collection, while long term studies require several years. Ex G- 20, page 1.

86) The compilers of a 1990 Danish follow- up report on Greenlanders, (Ex. D- 28), noted that new models for calculating specific organ dosages could alter the findings at page 23 of the 1988 study. They added however that;

> *"Considering the big uncertainty which, as stated in the* [1988] *report, is attached to these numbers, the difference should obviously not be deemed of particular importance."* D- 28 page 3)

ii) ALJ's Conflicted Finding on Anspaugh's Report

87) Despite the clear unreliability of the old 1988 study, the ALJ found Anspaugh's organ dose assessment,"*persuasively*" demonstrated Petitioner's radiation exposure would have been very low. DO 151; DO 158.

88) However she fudged this problematic finding by stating that " *critically, it is not necessary for me to credit Dr. Anspaugh's report at all.*" DO 158.

89) Never the less, she relied on it in finding Petitioners' exposure at Thule would have been "*minimal*". (Conclusion, DO 160).

d) Unsubstantial " Corroboration" of Mettler's Statistical Cancer Risk Assessment.

90) The ALJ erred by finding the employer's two (2) surgeons, Turnbull and Russo, "corroborated" Mettler's cancer risk for plutonium, despite both lacking any expert knowledge, qualifications or medical experience of Pu 239 irradiation. DO 154

i) Turnbull's Lack of Expertise

91)Turnbull, an elderly retired gastro- intestinal surgeon, admitted he was not an expert on the medical effects of radiation, nor published any articles on plutonium's effect on the human body. (T- 1648) His level of expertise on thyroid conditions was that of a first year medical student. (T-1645- T-1646)

92) Despite Petitioner's objections, he illegally sat in court during the entirety of Anspaugh and Mettler's radiation evidence, (T- 1151- T-1153; T- 1650), [9]

[9] In violation of 29 CFR Part B 18.615

reiterating what they had said "*yesterday*". T-1703, T-1712. See also in this regard T- 1717 to T 1719. He did not know of such matters from his own experience. T-1714- T 1715.

93) He could not state with any degree of medical certainly whether or not Carswell's stomach cancer was caused by plutonium since did not know "*anything*" about his stomach cancer. T -1651

94) Carswell's original records of his 1987 stomach surgery had been destroyed by the hospital, (Ex C- 6),and his own surgeon had died. Turnbull did not medically examine Carswell and only had a short one page medical history note by Carswell's current Australian treating physician. Ex C- 3.

A) Turnbull's Speculations

95) Turnbull speculated that all of Carswell's conditions were either caused by;

i) H. Pylori bacteria, though not an expert on H. Pylori, (T - 1701), did not know how it caused stomach ulcers, (T- 1716) and H. Pylori was not recorded in the medical history note; or,

ii) esophageal cancer, also not recorded in the note, (T- 1694), caused by a hernia- related gastric reflux, (T- 1672); also not recorded in the note and flatly contradicted by IME's Siegel's examination that "*no abdominal hernia was noted*", (DOL 2, page 8)

96) Since he could not state the nature of the stomach cancer's "precipitating event" with any degree of medical certainty, the ALJ seriously erred in finding his

speculative evidence corroborated Mettler's statistical cancer risk for plutonium.

97) See *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc*), where the sec.920 a) presumption was not rebutted by a medical expert being unable to state with any degree of medical certainty the nature of the "*precipitating event*".

98) *Compton v. Pennsylvania Avenue Gulf Service Center*, 14 BRBS 472 (1981), physician's opinion, based on inadequate information did not rebut sec. 920 a).

99) *American Grain Trimmers v OWCP* 181 F 3rd. 810, (Op. Para 32) where the ALJ found similar testimony, "*hedged and speculative*".

ii) Russo's Lack of Expertise [10]

100) Russo, a specialist in kidney surgery, like Turnbull, was not an expert in plutonium causing cancers. He admitted he was not aware of the dangers of inhaling plutonium as he had "*no real expertise in that area.*" (T- 1623) Since he was "*not an expert in plutonium as a carcinogen*" he was unable to assess the medical probabilities of Eriksen and Hansen's left kidney cancers being caused by ionizing radiation. (T- 1626). He conducted no examinations.

101) In his surgical practice, he would make a note in a patient's file about radiation, for an research team expert to look into, (T-1628; T-1629) The issue of radiation causing kidney cancer had never arisen in his practice. (T- 1621; T- 1625)

102) Since cancer arises from genetic damage, he also could not say with any degree

[10] The BRB's review erroneously "missed" Russo's evidence.

of medical probability what the cause of a specific cancer could be. (T- 1623, T. 1624)

103) Though smoking was a possible kidney cancer risk factor, he had no information on "*what cigarette at what time at what place could have caused it.*" (T- 1625) Hansen was a non- smoker.

B) Russo's "Inconvenient" Kidney Cancer Evidence

104) Unlike Turnbull, Russo had access to both Eriksen and Hansen's medical records, (Ex, E- 3; Ex. H- 3) From their medical records he stated that;

1) Eriksen's large 16 centimeter tumor would have been initiated 30 or 40 years ago. (T- 1608, T- 1609) Hansen's tumor of similar size (T- 1607; Ex. H- 3, page 5), would also have developed over the same 30 to 40 year period. (T- 1609) This placed the "precipitating event" for both Eriksen and Hansen's left kidney cancers within the Thule emergency work time- frame.

2) Eriksen's tumor, like Hansen's was "sporadic", that is, caused by a precipitating event, and not related to any inherited genetic abnormalities. (T- 1617)

105) This supported Robbins' opinion, (Ex E- 5 and Ex. H- 5),who reviewed the medical records as an occupational and environmental illnesses expert, and found with a degree of medical probability, that their left kidney cancers were caused by plutonium inhalation.

106) The ALJ failed to refer to this "inconvenient" evidence, in disingenuously finding Russo's evidence, like Turnbull's supported Mettler's statistical evidence

denying an excess cancer risk.

iii) Juel's Danish Government Probability "Studies"

107) Prior to the B- 52 crash, the health of young emergency workers was above the Danish average, due to stringent physical and medical testing to qualify for work at the remote Arctic Air Force base. (Carswell T- 63, T- 64; Hansen, Ex, H- 6.6)

108) The Danish Government commissioned Juel to "explain" their subsequent higher that normal death rate. (T- 1821) Like the questionable Danish 1988 urine study, Petitioners were not included in Juel's 1991 to 1995 studies, based on data from Danish hospital admissions and Death registers. [11] Hansen and Eriksen were diagnosed with left kidney cancers in 2002 and 2005 . Carswell's stomach cancer was diagnosed in Australia in 1986 .

A) ALJ's Misdirection Banning *Voir Dire*

109) The ALJ misdirected herself, contrary to 29 CFR Part 18. 702, by banning any *voir dire* of Juel and admitting his epidemiological studies into evidence, (Ex D- 38), after he refused to testify as an expert witness, (T- 1764) Lay witness opinions are limited only to perceptions which clarify the witness's evidence. 29 CFR Part 18.701.

---

[11] Ex. D- 38; **1991**, "*The Thule Episode Epidemiological Follow up After the Crash of a B- 52 Bomber in Greenland; Registry Linkage, Mortality, Hospital Admissions*". **1994**, "*High Mortality in the Thule Cohort; An Unhealthy Worker Effect*"; **1995** "*Reduced Fertility After the Crash of a US Bomber Carrying Nuclear Weapons? A Register Based Study on Male Fertility*".

B) Danish Suppression Policy on Thule Radiation Health Hazards

110) Prior to and during Juel's studies, the Danish Government suppressed all public access to quantitative information on Pu 239 contamination at Thule, (Ex G-5)

111) After Juel's studies, it continued its suppression policy in defiance of the EU Parliament by refusing to implement EU law (Directive 96/29) for medical monitoring of workers potentially exposed to past radiation, and refusing to provide emergency workers' physicians with access to its Thule radiation records.

C) Juel's "Shiftless Dissolute" Emergency Workers

112) Like Turnbull and Russo, Juel had no knowledge or experience of Pu 239 or its long- term internal medical hazards from inhalation and ingestion. Nor had he access to the Government's Thule radiation records.

113) He accordingly speculated that the emergency workers' illnesses and high death rate were due, not to radiation, but to alcohol and tobacco abuse and their unmarried life styles; "*High Mortality in the Thule Cohort; An Unhealthy Worker Effect*" (Ex D- 38. B) The contrary was true. The workers were statistically healthier than the average Dane due to stringent health requirements for work at Thule. T- 64, T- 65.

114) His speculation exposes the glaring inadequacy of such "probability" studies to determine the cause of a specific person's illness. All Petitioners were married with families and had, as the record showed, worked their entire lives. At the time of his cross- examination, Carswell still continued to work, despite a debilitating post-operative condition.

115) Juel's speculation is flatly contradicted by the 1991 medical report of the Danish Heath and Medical Authority, finding surviving workers to be otherwise generally healthier than average Danes and of a higher social status. Employer's Ex. D- 30, page 38. Reservations on hospital/ death data studies were noted at pages 15, 16, Ex. D- 30.

116) The US Air Force assessed the emergency workers as being;

"*without exception professional in their jobs and their cooperative and constructive attitudes were outstanding. The SAAMA team will long remember these fine people, both for their proficiency and for warm personal relationships that developed.*".

Ex. G-14.4;Report of US Colonel L.J. Otten, San Antonio Air Material Area.

e) ALJ Bias on Admission of "Other - Worker" Evidence

117) While the ALJ admitted the employer's probability evidence based on unidentified "other- workers", she refused to admit Petitioners' State autopsy evidence of fellow emergency worker Karl Banz. (G- 24, refused on 12/18/14)

118) The November 1990 State autopsy report of two pathologists, (Thomsen and Simonsen), and confirmed by a third, (Henriques), showed changes to Banz thyroid tissue, similar to past exposure to ionizing radiation.

119) She also rejected the attached sworn affidavit of Banz's sister, Gerda Andersen, that attempts by two members of a *"Special Danish Government Policy Committee on Radiation Issues at Thule"*, to alter the radiation finding, only ceased when the matter become a public scandal. See Addendum copy of G- 24.

CONCLUSION

i) The Director's egregious actions as a party- litigant with the employer in opposing Petitioners' claims, conflicted with his supportive duties as claims administrator and nullified the LHWCA's fair and efficient resolution scheme.

ii) In finding Carswell and Eriksen's claims untimely, the ALJ misapprehended the standard of "awareness" required in LHWCA sec. 913 b) 2).

iii) Probability evidence was insufficient to rebut work- related causation as the parties agreed only testing the Petitioners' urine for Pu 239 excretion would reliably determine this issue.

iv) For the above reasons, ALJ's denial of wage loss and the BRB's affirmation, must be vacated and Petitioners' cases remanded to an ALJ to assess and award their individual entitlements.

Dated March 24th 2020

Ian Anderson

Ian Anderson
Petitioners' Counsel
Kew Gardens, NY.
(718) 846- 9080

CERTIFICATE OF COMPLIANCE WITH FRAP RULE 32

1. This brief complies with the type- volume limitation of Federal Rules of Appellate Procedure 32 (a)(7)(B) because this brief contains 6,934 words, excluding the parts of the brief exempted by FRAP 32 (f).

2. The brief complies with the type- face requirements of FRAP 32 (a)(5) because the brief has been prepared in a proportionally spaced type- face using Microsoft Word in Times New Roman 14 point font.

Dated 24th March 2020

Ian Anderson
Petitioners' Counsel

ADDENDUM

Page

TABLE OF CONTENTS

ALJ WITNESS LIST

For Petitioners;

Testimony by Petitioners Carswell, Eriksen and Hansen

Testimony by video by Dr. Barnaby, UK Nuclear Physicist

Statement by Dr. Knight, UK Cambridge University, Geneticist

Affidavits by Dr. Robbins, Occupational & Environmental Medicine

For Employer;

Testimony by Dr. Anspaugh, Dose Reconstruction Expert

Testimony by Dr. Mettler, US Radiologist/ Epidemiologist

Testimony by Dr. Turnbull, retired Gastro- Intestinal Surgeon, (non- examining)

Testimony by Dr. Russo, Kidney Surgeon, (non- examining)

Testimony by video by Dr Juel, Danish Government Epidemiologist

For Director

Statements by Dr Siegel, "Independent" Medical Examiner

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---------- -X

Jeffrey G. Carswell
Heinz Eriksen
Bent Hansen

Petitioners

-against-

PETITION FOR REVIEW

E. Pihl & Sons
Topseo- Jensen & Schroeder Ltd
(Danish Construction Company)

Respondents

----------X

Jeffrey G. Carswell, Heinz H. Eriksen and Bent Hansen hereby petition for the review of the consolidated Decision and Order of the US Department of Labor Benefits Review Board issued December 11th. 2018 affirming the denial by US Department of Labor ALJ Odegard of workers compensation benefits to petitioners for illnesses caused by emergency work during a radiation disaster and from all parts thereof, including the Benefits Review Board's affirmation of the right of Department of Labor bureaucrats to appear with employers as party litigants in administrative trial and review proceedings and oppose workers compensation claims under the Longshore and Harbor Workers Compensation Act.

This Court is the proper venue for review since all administrative trial proceedings and "independent medical examinations" were conducted in New York City.

Dated; January 14th 2019

Ian Anderson.

Ian Anderson Esq.
Petitioners' Counsel
P. O. Box 15362
Kew Gardens
New York, NY 11415
718- 846- 9080
iandersonadvocate@msn.com

Dep't of Labor
BRB 18-0091
BRB 18-0092
BRB 18-0093

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of June, two thousand nineteen.

Present:

Ralph K. Winter,
José A. Cabranes,
Reena Raggi,
Circuit Judges.

Jeffrey G. Carswell, et al.,

Petitioners,

v. 19-151

E. Pihl & Sons, et al.,

Respondents.

Respondent United States Department of Labor, through its Director of the Office of Workers' Compensation Programs, moves to transfer this case to the United States Court of Appeals for the First Circuit. Petitioners cross-move to certify questions of law to the Supreme Court pursuant to 28 U.S.C. § 1254. Upon due consideration, it is hereby ORDERED that Petitioners' cross-motion is DENIED. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam); *Taylor v. Atl. Mar. Co.*, 181 F.2d 84, 85 (2d Cir. 1950) (per curiam). It is further ORDERED that Respondent's motion is GRANTED. *See* 28 U.S.C. § 1631; *Serv. Emps. Int'l, Inc. v. Dir., Office of Workers Comp. Program*, 595 F.3d 447, 454 (2d Cir. 2010).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

JEFFREY G. CARSWELL Claimant-Petitioner	)	BRB No. 18-0091
BENT HANSEN Claimant-Petitioner	)	BRB No. 18-0092
HEINZ H. ERIKSEN Claimant-Petitioner	)	BRB No. 18-0093
v.	)	**NOT-PUBLISHED**
E. PIHL & SONS, TOPSOE-JENSEN & SCHROEDER, LIMITED, and DANISH CONSTRUCTION CORPORATION Employers-Respondents	)	DATE ISSUED: 12/11/2018
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DECISION and ORDER

Appeals of the Decision and Order – Denying Benefits of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Ian Anderson, Kew Gardens, New York, for claimants.

Sarah B. Biser (Fox Rothschild, LLP), New York, New York, for E. Pihl & Sons.

Matthew W. Boyle (Kate S. O'Scannlain, Solicitor of Labor; Kevin

Lyskowski, Acting Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimants appeal the Decision and Order – Denying Benefits (2012-LDA-00540, 2012-LDA-00541, 2012-LDA-00543) of Administrative Law Judge Adele H. Odegard rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Each claimant contends his injury occurred as a result of the same event. On January 21, 1968, a United States Air Force B-52 bomber crashed near Thule Airbase in Greenland. The plane carried nuclear weapons, and the crash released radioactive plutonium (Pu-239). The U.S. military commenced clean-up operations to remove aircraft debris as well as contaminated ice and snow, loading it into storage tanks to transport back to the United States. Clean up, designated "Operation Crested Ice," lasted from January to September 1968. Claimants worked for the Danish Construction Corporation (DCC), a joint venture of Danish companies. They were assigned to the airbase and assisted with the clean-up operations. Claimants allege they were exposed to plutonium radiation which caused their cancers and resulted in losses of wage-earning capacity. They filed claims under the Act in the summer of 2010.[2] Decision and Order at 3-5, 118-119; CX 1; DX 1(a); HX 1.

---

[1] The Board granted claimants' motion to consolidate these cases for purposes of decision in its Order dated April 9, 2018. The claims were consolidated for decision by the administrative law judge as well. The Board denies claimants' motion for oral argument, filed September 19, 2018. 20 C.F.R. §§802.305-802.306.

[2] Only two venture companies of the DCC were viable at the time claimants filed their claims: E. Pihl & Sons (Pihl or employer) and Topsoe-Jensen & Schroeder (Topsoe). Topsoe refused service and refused to participate in the proceedings. While this case was pending before the administrative law judge, Pihl filed for bankruptcy in Denmark; the

Claimant Carswell was a shipping clerk responsible for verifying freight and for preparing documentation and labels to enable transport and identification of container contents. He alleges he was exposed to Pu-239 while he worked in the hangar in the vicinity of the loading operations and when he accompanied inspectors to the "tank farm" where workers transferred contaminated snow and ice from storage tanks to transport tanks. Carswell testified he was diagnosed with stomach and esophageal cancer in 1984 and underwent surgery. Tr. at 114-116. In 2005, he was diagnosed with a thyroid problem.

Claimant Hansen was a carpenter responsible for constructing shelters for workers at the crash site, shovels for scooping contaminated materials, and chutes for filling the storage tanks. He alleges he was exposed to Pu-239 when he delivered timbers and built shelters at the crash site and when he worked on the chutes in the vicinity of the loading operations. HX 6. Hansen was diagnosed with kidney cancer, and he underwent surgery in 2002 to remove his tumorous left kidney. HX 3.

Claimant Eriksen was a fireman assigned to observe the welding of the tanks and put out fires. He alleges he was exposed to Pu-239 while working in and near the hangar where the loading operations took place.[3] He testified that the floor of the hangar was often wet with contaminated melted ice and snow. Tr. at 176-180, 192-196, 285-290. In 2005, he was diagnosed with kidney cancer and had surgery to remove his tumorous left kidney. EX 3; Tr. at 203-209.

The administrative law judge, inter alia, found that: 1) the claims of Carswell and Hansen were untimely filed;[4] 2) claimants invoked the Section 20(a), 33 U.S.C. §920(a), presumption linking their harms to the exposure to Pu-239;[5] 3) employer rebutted the

---

bankruptcy court permitted Pihl's counsel to continue in these proceedings. Decision and Order at 3-4.

[3] Eriksen did not work at the crash site; the fire that resulted from the crash was left to burn itself out. Tr. at 218-219.

[4] The administrative law judge also found Eriksen's claim for disability due to his surgery to be untimely filed, but his claim for benefits following his retirement in 2008 is presumed timely. Decision and Order at 134. At the time of the hearings, Carswell was working in human resources for a cruise line; Hansen and Eriksen were retired. *Id.* at 10, 18, 25.

[5] The administrative law judge acknowledged employer's argument that, although the Thule incident occurred and caused the dispersion of plutonium radiation, the amount

presumption; 4) claimants failed to establish a causal relationship between their exposures and their cancers on the record as a whole; 5) claimants were not entitled to a default judgment against Topsoe; and 6) the Director, Office of Workers' Compensation Programs (the Director), was a proper party to the proceedings. Decision and Order at 139-146, 158-161. She denied the claims. *Id.* at 163-164.

Claimants appeal, challenging the administrative law judge's findings that two of the claims were not timely filed, that there is not a causal connection between their injuries and their employment exposure to plutonium radiation, and that default judgment was not warranted against Topsoe.[6] Employer responds, urging affirmance, to which claimants filed a reply brief. The Director also responds to the petition for review and urges affirmance of the administrative law judge's denial of benefits.[7]

---

of exposure was small and could not have caused claimants' conditions. Decision and Order at 145.

[6] Claimants also appeal "all related motions" decided during the proceedings before the administrative law judge; however, in addition to the denial of a default judgment, they specifically challenge only two other orders. Claimants first contend the administrative law judge erred in admitting Dr. Juel's testimony and reports into evidence because he was not an expert witness. Tr. at 1755-1766. The administrative law judge has great discretion concerning the admission of evidence and the issuance of a motion to compel, and any decisions in this regard are reversible only if arbitrary, capricious, or an abuse of discretion. *See Mugerwa v. Aegis Defense Services*, 52 BRBS 11 (2018), *recon. denied*, BRB No. 17-0407 (Oct. 4, 2018); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). Because of Dr. Juel's status as a government employee at the University of Southern Denmark, the Danish government prohibited his testimony as an expert witness. Tr. at 1755-1766. The administrative law judge did not abuse her discretion in permitting Dr. Juel to testify as a "fact witness" as claimants' counsel was permitted to cross-examine him. *See generally Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997).

Claimants also challenge the administrative law judge's order declining to compel Dr. Siegel to conduct urinalyses. The administrative law judge permitted the doctor to decide which objective tests would assist him in drawing his conclusions. Order at 7 (June 10, 2013). We reject claimants' contentions that the administrative law judge abused her discretion in this regard. *See generally Augillard v. Pool Co.*, 31 BRBS 62 (1997). As claimants are the proponents of the compensability of their claims, nothing prevented them from obtaining and submitting urinalysis evidence themselves.

[7] We acknowledge receipt of claimants' pleading wherein claimants reject the Director's brief and reserve any rights they may have against the Director and the agency

We first address claimants' contentions regarding a causal nexus between their work and their injuries as it is the dispositive issue.[8] Claimants contend the administrative law judge erred in finding that employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption linking their cancerous conditions to their plutonium exposures.[9] Once the Section 20(a) presumption is invoked, as here, the relevant inquiry is whether the employer produced substantial evidence of the lack of a causal nexus. *Rainey v. Director, OWCP,* 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *see Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Bath Iron Works Corp. v. Preston,* 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). An employer's burden on rebuttal is one of production, not persuasion; it is an "objective test," and the determination of whether the employer has produced "substantial evidence" that a reasonable mind would accept as evidence of the non-work-relatedness of the injury is a legal judgment and is not dependent on the relative credibility of competing evidence. *Bath Iron Works Corp. v. Fields,* 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *Rainey,* 517 F.3d 632, 42 BRBS 11(CRT).

Employer presented, inter alia, the medical opinions of Drs. Mettler and Turnbull and the plutonium radiation dosage estimates of Dr. Anspaugh. The administrative law

---

should the Board accept and give weight to the Director's brief and arguments. We reject claimants' contention that the Director is not a proper party in proceedings under the Act before the administrative law judge and the Board. The Act's regulations establish the Director's standing. *See* 20 C.F.R. §§701.201, 702.321(b)(3), 702.333(b); 801.2(a)(10); *see Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *Powell v. Brady Hamilton Stevedore Co.*, 17 BRBS 1 (1984); *see also Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001); *Ahl v. Maxon Marine, Inc.*, 29 BRBS 125 (1995); *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991); Board's Order (October 11, 2018).

[8] While claims for disability benefits must be filed within a specific period following a claimant's awareness of the relationship between his injury, work, and disability, claims for medical benefits are never time-barred. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. *en banc*).

[9] The administrative law judge invoked the Section 20(a) presumption based upon the opinions of Drs. Barnaby, Edwards, and Rollins that claimants' cancers were caused by their exposure to Pu-239, in conjunction with claimants' testimony and the evidence establishing the occurrence of the plane crash and the potential for plutonium exposure. Decision and Order at 140-144.

judge found this evidence rebuts the Section 20(a) presumption. Decision and Order at 145-146. Dr. Anspaugh, who has a Ph.D. in biophysics and is an expert in the field of radiation dosimetry, relied on documents from and about the Thule incident, as well as studies on plutonium radiation and his own expertise to conclude that the uppermost dose of radiation claimants' organs could have received from the Thule incident was far less than the average exposure a person is subjected to each year from background radiation. DX 23 at 8, 13; *see* Decision and Order at 47-49, 89-101. He considered the amount of radiation dispersed from weapons-grade plutonium and explained that plutonium must enter the body through inhalation, ingestion, or an open wound in order to be hazardous, and its normal targets are the lungs, the liver, and the bones. Further, he stated that, because none of the urine samples from the 1988 studies of non-Americans who were at Thule at the time of the 1968 incident met the detection limit of the test (no positive results of radiation), claimants, likewise, would have received no demonstrable dose from the clean-up activities. DX 23 at 1, 9-14; *see also* DXs 26-30.

Dr. Mettler, a medical doctor board certified in radiology and nuclear medicine and an expert on the effects of radiation on humans, opined that claimants' diseases were not due to plutonium radiation from the Thule incident given Dr. Anspaugh's dosage estimates. DX 32. Based on the studies he attached to his report, and with a high degree of certainty, Dr. Mettler stated there is extremely low probability of a causal relationship because there is no evidence in the literature of increased incidents of stomach, esophagus, and kidney cancers with exposure to plutonium radiation. *Id.* at 9-10; DX 33; *see* Decision and Order at 55-61, 101-106. Similarly, Dr. Turnbull, an emeritus oncology surgeon from Sloan-Kettering Cancer Center specializing in the gastric and mixed tumor service, testified that Carswell's stomach and esophagus cancer is more likely to be related to his Barrett's esophagus and reflux syndrome, or to an H. pylori infection, than to exposure to plutonium. He also stated that any thyroid problems Carswell may have (which he found to be unclear) are age-related. DX 35 at 3-4; DX 42; *see* Decision and Order at 63-65, 109-113.

An expert's opinion, given to a reasonable degree of medical or scientific certainty, that a claimant's condition is not causally related to an injurious exposure at his work constitutes substantial evidence rebutting the Section 20(a) presumption. *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Sprague v. Director, OWCP,* 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982); *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013). Therefore, the administrative law judge correctly found that the opinions of Drs. Anspaugh, Mettler, and Turnbull constitute substantial evidence rebutting the Section 20(a) presumption linking claimants' cancers to plutonium radiation. *Truczinskas v. Director, OWCP,* 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012); *Cline*, 48 BRBS 5. We affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption in each case.

Once the Section 20(a) presumption has been rebutted, it drops from the case, and the question of a causal relationship must be decided on the record as a whole with each claimant bearing the burden of establishing the work-relatedness of his injury by a preponderance of the evidence. *Sprague,* 688 F.2d 862, 15 BRBS 11(CRT); *see Marinelli v. American Stevedoring, Ltd.*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). On the record as a whole, the administrative law judge found that claimants provided little evidence linking plutonium exposure and their respective cancers, though they demonstrated the risks of plutonium exposure in general. She gave little weight to claimants' experts, specifically noting the lack of detailed explanations or evidentiary support from either Dr. Robbins, who reviewed Hansen's and Eriksen's records, or Dr. Edwards, Carswell's treating physician.[10] Decision and Order at 152-154; CXs 3, 5; DXs 7a, 11, 14-15; EXs 3-5; HXs 3, 5. She also acknowledged that employer's experts are better credentialed, with greater experience and expertise on the topics of cancer and radiation, than claimants' experts.[11] *Id.* at 152. The administrative law judge found:

> [I]n order for me to conclude that the Claimants' health conditions were due to any plutonium radiation exposure at Thule, I would have to discount the opinions of highly-credentialed physicians and ignore a multitude of medical and epidemiological studies, in favor of the vague opinions of Dr. Robbins

---

[10] Dr. Robbins stated only that it is "reasonable" to conclude kidney cancer is associated with the "potential risk of plutonium inhalation during the period [they were] involved in contamination clean-up operations at Thule." DX 7a; EX 5; HX 5. Dr. Edwards stated "it is widely accepted that exposure to ionizing radiation can cause many cancers – carcinoma of the stomach being one of them." DX 11. He also stated "there is a reasonable degree of probability" that Carswell's hypothyroidism is "attributable to the longterm effect of radiation exposure." CX 5; DX 14. Neither doctor provided scientific support for their conclusory statements. Additionally, Dr. Turnbull disputed Dr. Robbins's categorization of Hansen's and Eriksen's kidney cancers as "advanced" because "advanced" generally refers to widespread cancer, and, here, the tumors were contained and removed with good results. DX 35 at 6.

[11] The qualifications of Drs. Robbins and Edwards are not in the record, but Dr. Turnbull looked them up. Decision and Order at 152 n.241. Per Dr. Robbins's letterhead and Dr. Turnbull's research, Dr. Robbins specializes in allergies and environmental health, and Dr. Edwards is a general practitioner with a special interest in dermatology, obstetrics, gynecology, and fertility. *Id.*; DX 35; EX 5; HX 5. Employer's experts, on the other hand, all specialize in studying cancer or radiation and their effects on the human body.

> and Dr. Edwards, as well as the conclusory opinion of Dr. Barnaby. I would also have to ignore the testimony of Dr. Mettler and others regarding the specific health effects of plutonium radiation, in favor of reports and studies that addressed the health effects of radiation, but did not specify the type of radiation involved.

Decision and Order at 158;[12] *see id.* at 155-157;[13] *see also* CX 9; DOLXs 2-3, 10; EX 9; HX 8.

Having exhaustively set forth the evidence and having permissibly identified the evidence she deemed probative, Decision and Order at 7-117, we reject claimants' assertions that the administrative law judge erred in giving greater weight to employer's evidence. The fact-finder has the discretion to weigh, credit, and draw her own inferences from the evidence of record; she is not bound to accept the opinion or theory of any particular expert. *See Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). The Board may not reweigh the evidence but may assess only whether there is substantial evidence to support the

---

[12] Claimants submitted the report of Dr. Barnaby, who has a Ph.D. in nuclear physics and specializes in nuclear weapons. He discussed weapons-grade plutonium and toxicity due to radioactivity and chemicals, stating, in general, that it is cancer-causing. He concluded that participation in the clean-up operations "would have seriously exposed [claimants] to the risk of plutonium inhalation and the long-term development of cancer." GX 3. Dr. Anspaugh questioned Dr. Barnaby's summary conclusion, as his report was less than three pages long, did not contain any quantitative information or supporting studies, and was vague. DX 23 at 10.

[13] The administrative law judge acknowledged the large number of studies presented by the parties but specifically noted "there cannot be an epidemiological study more relevant to the issues before me than Dr. Juel's study of the DCC workers at Thule" during the time of the crash and clean-up. Decision and Order at 157 n.257. Dr. Juel holds a Ph.D. in epidemiology and is the head of a research program on health and morbidity at the National Institute of Public Health in Denmark. DX 38; Tr. at 1766-1769. Having conducted multiple studies concerning the health effects, cancer incidence, and morbidity rate of Thule crash workers and compiled data from other studies as well as from Danish hospital and death registries, he concluded there is no difference in total mortality rates or hospital admission rates between those Danes who worked at Thule at the time of the crash and clean-up and those who worked at Thule at other times. Dr. Juel concluded there were no harmful effects from having participated in the Thule clean up. DXs 5, 38, 45; *see* Decision and Order at 50-53, 113-116.

administrative law judge's decision. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981).

The administrative law judge found that claimants did not satisfy their burden of proving the causal nexus between their employment at the Thule airbase and their medical conditions. She gave greater weight to the evidence of record refuting any causal connection between any exposure to Pu-239 and claimants' cancers. These findings are rational and supported by substantial evidence.[14] *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). Therefore, we affirm the administrative law judge's denial of benefits.[15]

---

[14] Claimants assert that employer's evidence conflicts with other federal laws recognizing that radiation is cancer-forming. Cl. Br. at 11, 22-23. The enactment of other laws, which have their own criteria for applicability, does not negate the requirements for establishing entitlement to benefits for a specific injury in a claim under the Act. *See* 42 U.S.C. §1651(c) (exclusivity of liability); 33 U.S.C. §905(a) (exclusivity of liability); *Vilanova v. U.S.*, 851 F.2d 1, 21 BRBS 144(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 1016 (1989) (exclusivity); *see also O'Connor v. Yezukevicz*, 589 F.2d 16 (1st Cir. 1978) (absent subject matter jurisdiction, statute does not apply). Nor does such other law interfere with an administrative law judge's authority to weigh the evidence before her. 5 U.S.C. §554 *et seq.*; 33 U.S.C. §§919, 923, 927.

[15] We reject claimants' contention that the administrative law judge should have immediately granted their motion for a default judgment against Topsoe. Section 18.21(c) of the Rules of Practice and Procedure of the Office of Administrative Law Judges provides:

> *Failure to appear*. When a party has not waived the right to participate in a hearing, conference or proceeding but fails to appear at a scheduled hearing or conference, the judge may, after notice and an opportunity to be heard, dismiss the proceeding or enter a decision and order without further proceedings if the party fails to establish good cause for its failure to appear.

29 C.F.R. §18.21(c) (emphasis in original). The language makes clear that the decision to issue an order against a party who has failed to appear or establish good cause is discretionary. *Id.* Generally, courts are to issue default judgments sparingly but set them aside readily. *McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136, 140 (2002)

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

(citing *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90 (2d Cir. 1993)). FRCP 55 provides guidance for determining whether a party has established good cause such that default should not be ordered or should be set aside. Fed. R. Civ. P. 55; *see also McCracken*, 36 BRBS at 140. One factor to consider is whether the party has a meritorious defense. *Id.*; *see Indigo Am., Inc. v. Big Impressions, LLC*, 597 F.3d 1, 3 (1st Cir. 2010).

By virtue of their relationship as members of the DCC joint venture, the administrative law judge recognized that Pihl and Topsoe have the same liability such that Pihl's defense can be attributed to Topsoe. Decision and Order at 160: Order Denying Claimants' Motion for Default Judgment at 5; *see generally U.S. v. BDO Seidman, LLP*, 492 F.3d 806 (7th Cir. 2007) (members of joint venture have common legal interest in venture's defense); *Edens v. Hannigan*, 87 F.3d 1109 (10th Cir. 1996) (representation of multiple defendants poses no conflict unless there is a divergence of interests with respect to a material fact or legal issue); ALJX 1. By not addressing claimants' motion for default judgment until after she considered all the evidence and rendered her decision, the administrative law judge determined Pihl's non-liability and, consequently, Topsoe's. Decision and Order at 160; *see* Fed. R. Civ. P. 55(b)(2); *see Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., Div. of Ace Young, Inc.*, 109 F.3d 105 (2d Cir. 1997) (court may conduct a hearing to ensure there is a basis for damages and to ascertain the amount for which the defendant would be liable); *see also Indigo Am., Inc. v. Big Impressions, LLC*, 597 F.3d 1 (1st Cir. 2010) (court set aside default judgment after considering factors). The granting of default judgment is discretionary; claimants have not shown that the administrative law judge abused her discretion by delaying a decision on the motion until she determined the compensability of the claims based on the evidence presented by the appearing parties. *See Indigo Am., Inc.*, 597 F.3d at 3; *McCracken*, 36 BRBS at 140. The finding in favor of Pihl means there is no basis to render judgment against Topsoe.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

NOTICE OF APPEAL RIGHTS

A decision of the Benefits Review Board shall become final sixty (60) days after its issuance unless a written petition for review is filed with the Appropriate United States Court of Appeals prior to the expiration of the sixty (60) day period, or unless a timely request for reconsideration is filed with the Board. 33 U.S.C. Section 921; 30 U.S.C. Section 932(a); 20 C.F.R. Sections 802.406, 802.407. Therefore, you are advised that you may SEEK RECONSIDERATION OF, OR APPEAL, a final decision of the Board within the time limits set forth below. **THE TIME LIMITS CANNOT BE EXTENDED, AND YOU MUST SUBMIT YOUR REQUEST TO THE PROPER PLACE WITHIN THE TIME PROVIDED.**

If you seek RECONSIDERATION by this Board (that is, if you want the Board to reconsider its decision), you **must** submit to the Board a written Motion for Reconsideration within **THIRTY 30 DAYS OF THE DATE STAMPED ON THE FRONT OF THIS DECISION**. Your motion should identify any error you find in the Board's opinion and state the reasons you believe warrant further consideration of your case. If you file a timely motion for reconsideration, you will have sixty (60) days from issuance of the Board's decision on reconsideration to file an appeal with a Court of Appeals, as set forth below.

Alternatively, if you wish to APPEAL to a United States Court of Appeals, you must insure that a petition for review is received by **THE APPROPRIATE COURT (NOT THIS BOARD) WITHIN SIXTY (60) DAYS OF THE DATE STAMPED ON THE FRONT OF THIS DECISION.** The petition for review should contain the case number and the date of the Board's decision. The petition should be sent to the court of Appeals which covers the state in which the employee's injury occurred. In a black lung claim, any state in which the miner had coal mine employment may be considered the state in which the injury occurred (i.e., for a black lung appeal, you may file in any Court of Appeals covering any state in which you worked as a miner). Listed on the back of this page are the twelve Courts of Appeals and the states they cover. You should identify the court covering the state of injury (including all states of mine employment for black lung claims) and file your petition with that court. If you appeal directly to the court of Appeals you may not later get reconsideration by the Board. However, if you seek Board reconsideration you may later appeal the Board's ruling on reconsideration to the Court of Appeals.

IF YOU HAVE ANY QUESTIONS ABOUT THE PROCEDURES TO BE FOLLOWED IN YOUR CASE, CALL THE OFFICE OF THE CLERK OF THE BOARD, (202) 693-6300.

**In Defense Base Act cases, The United States Courts of Appeals for the Fourth, Fifth, Sixth and Eleventh Circuits have held that decisions must initially be appealed to the United States District Court where the office of the appropriate district director is located.

SUMMARY OF ALJ FINDINGS IN 164 PAGE DECISION

i) On January 21st. 1968 a B- 52 aircraft carrying nuclear weapons crashed and burned approximately eight (8) miles for the USAF Base at Thule, Greenland, resulting in radioactive contamination of the area by the dispersal of plutonium, mainly Pu 239, (weapons grade plutonium). USAF leaders were immediately aware of the danger of plutonium contamination and initiated a clean- up program called "Operation Crested Ice"for the removal of radioactive debris together with radioactive ice and snow for transhipment to the United States. Plans were drawn-up to attempt to minimize participants' exposure to radiation during the clean- up operation. (DO 118,119)

ii) Defense Base Act jurisdiction had been established over Claimants claims. (DO 123)

iii) An employer- employee relationship had been established. (DO 123)

iv) Named respondents E. Pihl & Son and Topsoe- Jensen & Schroeder LTD. were the relevant parties to respond to the claims. (DO 124)

v) Claimants' testimony was mainly consistent with the documentary records of clean- up operation, namely, loading of large tanks indoors with contaminated ice and snow from the crash site in Hanger 2 during the Arctic winter; the welding shut of the large tanks in Hanger 2 and later outdoors at the tank farm; a fire-watch existed during all welding processes. Claimant Hansen's photographs depicted events referred to in the governmental documents; Claimant Carswell had tank farm exposure. (DO 125 to 127)

vi) Claimant Carswell drank beverages containing ice from the fjord where the crash occurred for three (3) years thereafter. (DO 127)

vii) Claimants Notices of Injuries, LS 201, were not time- barred under Sec. 912(a) LHWC Act. (DO 131)

viii) Claimant Carswell and Hansen's LS 203 Compensation Notices were time-barred by Sec 913 (b)(2) LHWC Act. (Carswell, DO 132- 134; Hansen DO 135)

ix) Claimant Eriksen's LS 203 Compensation Notice was not time- barred. (DO 134)

x) Claimant Carswell established a *prima facie* case for his thyroid condition. (DO 140, 143) Claimants Eriksen and Hansen established *prima facie* cases for their left kidney cancers, (DO 144)

xi) Employer's evidence rebutted the Sec. 920 (a) LHWC Act presumption. (DO146)

xii) On analysis of all evidence, Claimants failed to establish causation by the preponderance of evidence, (DO 160)

xiii) No default judgement was issued against Topseo- Jensen & Schroeder Ltd., though requested on December 12th. 2012. (DO 160)

xiv) It was "prudent" to allow the Director's Boston Office to participate in the hearings as a party litigant. (DO 161)

xv) There were on other avenues of recovery open to Claimants. (DO 163)

xvi) No attorney's fees were allowed. (DO 164)

STATEMENT OF GERDA ANDERSEN

I the undersigned Gerda Andersen state the following under oath.

1) I am the sister of Karl Banz who was employed at the US Air Force Base at Thule by the Danish Construction Corporation in Vehicle Maintenance Control at the time of the 1968 crash at Thule of a US B- 52 with nuclear weapons. See attached US Air Force Letter of Recommendation of April 22nd. 1969.

2) Prior to his death in 1988, my brother often discussed with me his activities at Thule after the crash. During the "clean- up" operations following the crash, my brother worked in the Vehicle Maintenance area where all trucks and vehicles employed in the "clean- up" operations had to be cleaned and serviced daily by removing caked ice and snow from the contaminated crash site from their wheels and exterior with high powered hoses.

3) The cleaning process washed the caked ice and snow from the vehicles and formed a slushy deposit on the floor of the Vehicle maintenance area. He had to work in these slushy conditions without any protection from radiation on a daily basis for several months in order to clean the contaminated ice and snow from the vehicles and service them.

4) Subsequently in the 1980s, my brother developed a range of serious health problems which he suspected was caused by his work at Thule during the "clean-up" operations. Since the Danish government refused to release any of the radiation records of contamination at Thule during the "clean- up " period, my brother had no information which could link his conditions to radiation exposure.

5) As a result, after he died in July 1988, I insisted that a comprehensive autopsy be conducted on his body. Initially the Danish Health authorities refused such an autopsy request. After I made persistent requests an autopsy was eventually permitted and conducted in July 1988.

6) Though the autopsy was undertaken in 1988, I could not obtain access to the autopsy report. Again after persistent demands to see the report, it was finally released to me two and a half years later in 1991. The report and translation is attached hereto.

7) The autopsy was conducted by Jorgen L Thomsen at the Department of Forensic Medicine of Copenhagen University. As appears from the second page of the translation, changes in the connective tissue of my brother's thyroid gland were found and attributed to ionizing radiation. This finding was confirmed by Dr. Henriques of the Department of Pathology at Aarhus University Hospital. Professor Jorn Simonsen of the Copenhagen University Forensic Medicine Department also agreed with this finding.

8) However attempts were made by two senior Danish Health Ministry doctors to have the thyroid conclusion altered. Dr Niels Rosdahl and Dr. Harriet Dige-Petersen, a Danish National Health Service adviser, attempted to have the thyroid conclusion in the autopsy report "cancelled". These two senior doctors were also members of a special governmental policy committee to consider radiation issues at Thule.

9) Only after the attempts by these doctors to alter the autopsy report became public was the original report, attached hereto, allowed to remain standing.

10) Based on my brother's autopsy report and the obstructive behaviour of Danish medical officials including the two doctors referred to in paragraph 8) above, I personally have no doubts that the serious deterioration of my brother health was attributed to his daily exposure to contaminated ice and snow in the Vehicle Maintenance area during the period of the "clean- up" operation.

Gerda Andersen

Sworn to before me

Date 22.05.2014

Joachim Lind
Politiassistent

NORDSJÆLLANDS POLITI
Station Syd
Ørnegårdsvej 16, 2820 Gentofte
Mail: nsj@politi.dk

Jens Buus-Pedersen
Politibetjent

DANISH CONSTRUCTION CORPORATION

APO, New York 0 90 23. N. Y. USA. Cable: Condacor Dundas

A Joint Venture of
Delmac ⅓
H. Hoffmann & Sønner ⅓
E. Pihl & Søn
Topsøe-Jensen & Schrøder ⅓
⅓ Wright, Thomsen & Kier

DCC 20

ANBEFALING

Karl Heinrich Ludvig Banz, 271016

Thule, den 9 MAJ 1969
AS/ps

Det bekraeftes herved, at herr Karl H.L. Banz har vaeret ansat i Danish Construction Corporation, Thule Air Base, Grønland, fra 26 JUN 1965 til 23 APR 1969. I dette tidsrum har herr Banz ledet databehandlingsarbejdet i Vehicle Maintenance, hvilket omfatter bearbejdning af specifikationer over reparation- og vedligeholdelse og sammenfatning af materialet til faste programmer. Desuden har arbejdet omfattet periodiske analyser samt omfattende kontrolpunkter.

Vi kender herr Banz som en paalidelig og dygtig medarbejder, der udfører et korrekt og fejlfrit arbejde, og som har udpraegede evner for databehandling, og vi medgiver gerne herr Banz vor bedste anbefaling.

Michel Uldal, Site Manager
DANISH CONSTRUCTION CORPORATION

TRANSLATION

DANISH CONSTRUCTION CORPORATION

REFERENCE

Karl Heinrich Ludvig Banz, 271015

Thule, 9 May 1969
AS/ps

This is to certify that Mr. Karl H. L. Banz was employed with Danish Construction Corporation, Thule Air Base, Greenland, from 26 June 1965 to 23 April 1969. In this period Mr. Banz was in charge of the data processing work in Vehicle Maintenance comprising the processing of specifications of repair and maintenance work and the synthesizing of the material into programs. The work included moreover periodic analyses and extensive control points.

We know Mr. Banz as a reliable and competent employee, who performs his work in a correct and flawless manner and who has a distinct talent for computer processing, and we are pleased to recommend him warmly.

(signature)
Eichel Uldal, Site Manager
DANISH CONSTRUCTION CORPORATION

I hereby certify that this is a true
and faithful translation of the
Danish document presented to me.
Aarhus, 26 November 2015

Kirsten Risom
Authorized translator

RETSPATOLOGISK INSTITUT
VED KØBENHAVNS UNIVERSITET

STATSOBDUCENTURET

DATO 22. NOV. 1990

J. nr. U1/88

JLT/ks

Sundhedsstyrelsen
v. overlæge Nils Rosdahl

I tilslutning til retslægelig obduktion den 06.07.88 af

Karl Heinrich Ludwig Bønz

Cpr.nr. : 161027-1789
Stilling: uden arbejde, tidl. assistent
Bopæl : Husumvej 82, 2700 Brønshøj
Dødfunden: 30.06.88 kl. 14.15

er der på materiale, udtaget i forbindelse med obduktionen, foretaget følgende supplerende undersøgelse(r):

1. Mikroskopisk undersøgelse
Der blev undersøgt væv fra forskellige afsnit af hjernen, lillehjernen og hjernestammen, fra skjoldbruskkirtlen, lungerne, forskellige afsnit af hjertet, lymfeknuder fra brystkassen og halsen, leveren, milten, bugspytkirtlen, nyrerne, binyrerne, tyndtarm, tyktarm, testikel, prostata og knoglemarv. Der blev herved stillet følgende diagnoser:

H.D.: - Væv fra centralnervesystemet uden patologiske forandringer
- Fibrosis gld. thyreoideae, følger af ioniserende stråling kan ikke udelukkes
- Emphysema acutum et chronicum pulmonum
- Infarctus parvae pulmonum?
- Myocardium med stedvis fibrose og forkalkning
- Lymfeknudevæv med uspecifikke, reaktive forandringer
- Degeneratio steatosa hepatis mg. gr.
- Fibrosis periportalis med. gr.
- Milt uden sikre patologiske forandringer
- Calcificationes parvae renis dxt.
- Calculi prostatae
- Autolysis organorum.

Det vil sige, at der ikke blev påvist noget abnormt i centralnervesystemet.

Der blev fundet bindevævsomdannelse af skjoldbruskkirtlen, som det kan ses som følge af såkaldt ioniserende stråling. Dette præparat har været konfereret med overlæge, dr. med. Ulrich Henriques, Patologisk-anatomisk Institut, Århus Kommunehospital. Denne har

erklæret sig enig i nævnte diagnose, idet han anfører, at han ikke kan nå nogen sikker diagnose på det foreliggende, men man må blandt andre muligheder, overveje muligheden af strålefølger.

Det skal endvidere bemærkes, at overlæge Henriques foretog denne vurdering uden andet kendskab til sagen end køn og alder.

Der fandtes endvidere akut og kronisk luftudvidelse af lungerne, muligt små henfaldsprocesser i disse, bindevævsomdannelse og forkalkning i områder af hjertemuskulaturen, uspecifikke forandringer i lymfeknudevævet, svær fedtomdannelse af leveren, som det karakteristisk kan ses som følge af alkoholmisbrug, moderat bindevævsomdannelse i levervævet, normalt miltvæv, små forkalkninger i højre nyre, stendannelser i blærehalskirtlen og forrådnelsesforandringer i organerne generelt.

2. Plutoniumanalyse af begge knæskaller og væv fra leveren, lymfeknudevæv og knoglemarv

Af kopi af erklæring fra Forskningscenter Risø, sign. Asker Aakrog fremgår, at der ikke med sikkerhed blev konstateret plutonium i nogen af de modtagne prøver.

Konklusion:
Efter de supplerende undersøgelser må dødsårsagen antages at være den påviste hjerte- og lungelidelse.

P. I. V.

Jørgen L. Thomsen
Prosektor

Jørn Simonsen
Professor, dr. med.

Erklæringen omfatter mikroskopi

TRANSLATION

DEPARTMENT OF FORENSIC MEDICINE — DATE 22 November 1990

COPENHAGEN UNIVERSITY

STATE AUTOPSY — Ref. No. U1/88

JLT/ks

Danish Health and Medicines Authority

By Consultant Nils Rosdahl

In continuation of the autopsy performed by the medical examiner on 8 July 1988 of

Karl Heinrich Ludwig Benz

CPR No.:	161027-1789
Occupation:	unemployed, former assistant
Address:	Husumvej 82, DK-2700 Brønshøj
Found dead on:	30 June 1988, at 14:15

the following supplementary examination(s) has been made of specimens sampled in connection with the autopsy:

1. Microscopic examination
   Tissue was examined from various sections of the brain, cerebellum and the brainstem, from the thyroid gland, the lungs, various sections of the heart, lymph glands from the chest and neck, the liver, the spleen, the pancreas, the kidneys, the adrenal bodies, the small intestine, the colon, testicle, prostate and bone marrow. This resulted in the following diagnoses:

   M.D. - Tissue from the central nerve system without pathological changes
   - Fibrosis gld. Thyreoideae, after-effects from ionizing radiation cannot be excluded
   - Emphysema acutum et chronicum pulmonum
   - Infarctus parvae pulmonum?
   - Myocardium with sporadic fibrosis and calcification
   - Lymph gland tissue with unspecific reactive changes
   - Degeneratio steatosahepatis mg. gr.
   - Spleen without certain pathological changes
   - Calcificationes parvae renis dxt.
   - Calculi prostatae
   - Autolysis organorum

This means that nothing abnormal was found in the central nerve system.

Connective tissue transformation of the thyroid gland was found, as can be seen following ionizing radiation. This specimen was conferred with Dr. Med. Ulrich Henriques, consultant at the Dept. of Pathology and Anatomy, Aarhus University Hospital. He agreed in the above diagnosis stating that he cannot reach a certain diagnosis based on the information available, but that one of the possibilities that should be considered is after-effects from radiation.

It should be noted that Dr. Henriques gave his opinion knowing only the sex and age of the person concerned.

Moreover, acute and chronic air extension of the lungs was found, possibly small necrosis processes in these, connective tissue transformation and calcification in areas of the cardiac musculature, unspecific changes of the lymph gland tissue, heavy fat transformation of the liver, a characteristic result of alcohol abuse, moderate connective tissue transformation of the liver tissue, normal spleen tissue, small calcifications of the right kidney, stone formations in the prostate, and putrefactive changes of the organs generally.

2. Plutonium analysis of both knee caps, and tissue from the liver, lymph gland tissue, and bone marrow.

It appears from a copy of a statement from Research Centre Risø, signed Asker Aakrog, that the presence of plutonium was not demonstrated with certainty in any of the specimens received.

Conclusion:

After the supplementary examinations the cause of death must be assumed to be the heart and lung disease proved.

For the Department

(signature)	(signature)
Jørgen L. Thomsen	Jørn Simonsen
Prosector	Professor, Dr. Med.

The statement includes microscopy

I hereby certify that this is a true and faithful translation of the Danish document presented to me.

Aarhus, 12 May 2014

Kirsten Risom

Authorized translator

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

---------- -X

Jeffrey G. Carswell
Heinz Eriksen
Bent Hansen

Docket No. 19- 1630

Petitioners

against-

E.Pihl & Son
Danish Construction Company
Topseo- Jensen & Schroeder Ltd.
Director OWCP

Respondents

----------X

CERTIFICATE OF SERVICE

The undersigned Ian Anderson Esq., attorney for the above named Petitioners, hereby certifies that this motion is filed electronically in compliance with the First Circuit's Electronic Filing System.

All parties appearing in these agency review proceedings, including the US Department of Labor's representative, have registered CM/ECF accounts with the First Circuit Court of Appeals for electronic service of papers. As such service of paper copies of this reconsideration motion is not required.

Dated; March 24th. 2020

Kew Gardens, New York

Ian Anderson

Ian Anderson
Attorney for Petitioners
Tel. 718- 846- 9080
iandersonadvocate@msn.com